

N. 2930

No. 14693

United States
Court of Appeals
for the Ninth Circuit

MAY W. BENTLEY, RAYMOND L. RUSNAK
and JOSEPH HOMAN,

Appellants,

vs.

ROSEBUD COUNTY, MONTANA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Montana, Billings Division

FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Attorneys for Defendant Rosebud County,
Montana, and Appellee.

In the District Court of the United States for the
District of Montana, Billings Division

Civil No. 1460

MAY W. BENTLEY, RAYMOND L. RUSNAK,
and JOSEPH HOMAN,

Plaintiffs,

vs.

ROSEBUD COUNTY, MONTANA, a Body Corporate;
ROY M. KING, Sometimes ROY KING, and CELIA I. KING, His Wife, and
EDWARD L. GREBE, Sometimes E. L. GREBE, and CAROLINE GREBE, His Wife,

Defendants.

COMPLAINT

The plaintiffs complain of the defendants as follows:

I.

The plaintiff, May W. Bentley, now at the commencement of this action is, and long heretofore has been, a citizen and resident of the state of Oregon.

II.

The plaintiffs, Raymond L. Rusnak and Joseph Homan, now at the commencement of this action are, and long heretofore have been, citizens and residents of the State of Illinois.

III.

The defendant, Rosebud County, Montana, now at the commencement of this action is, and at all

times herein has been, a citizen and resident of the State of Montana, viz., a body corporate under the laws of the State of Montana with its county seat at Forsyth, Montana, within the territorial boundaries of the said county.

IV.

The defendants, Roy M. King, sometimes Roy King, and Celia I. King, his wife; Edward L. Grebe, sometimes E. L. Grebe, and Caroline Grebe, his wife, now at the commencement of this action are, and at all times herein have been, citizens and residents of the State of Montana.

V.

This is a civil action in which the matter in controversy is the title to the lands and real estate hereinafter more particularly described together with the appurtenances thereto and the rents, issues and profits therefrom, which is of the value of \$75,000.00 and more.

VI.

This Court therefore has jurisdiction of this civil action and in the premises, because herein the matter in controversy exceeds the sum or value of \$3,000.00, exclusive of interest and costs, and is wholly between citizens of different states, viz., between citizens of the states of Oregon and Illinois as plaintiffs, and citizens of the State of Montana as defendants.

VII.

The plaintiffs now are, and at the times herein have been, the owners in fee simple absolute of the

following described lands and parcels of real estate lying and being in Rosebud County, Montana, to wit:

All of Section Fifteen (15) in Township Eleven (11) North, of Range Thirty-two (32) East, Montana Principal Meridian, Montana; together with all and singular the tenements, hereditaments and appurtenances thereto and the rents, issues and profits therefrom,

and therefore claim title as aforesaid to the said real estate.

VIII.

The defendants, Rosebud County, Montana, a body corporate; Roy M. King, sometimes Roy King, and Celia I. King, his wife, and Edward L. Grebe, sometimes E. L. Grebe, and Caroline Grebe, his wife, one and all claim some right, title, estate or interest in or to the real estate herein described, or in or to some part or parcel thereof, viz., adverse to the plaintiffs' ownership. But the claims of the defendants as aforesaid, and of each such defendant, are wholly unfounded and without right; and the said defendants one, each and all have no right, title, estate or interest in or to the said real estate, or in or to any part or parcel thereof.

Wherefore the plaintiffs pray that the claims of the said defendants, and of each of them, to the real estate herein described and in the premises may be determined, that the title in fee to the said real estate be quieted in the plaintiffs against the claims of the said defendants, and of each of them,

that the plaintiffs be adjudged to be the owners of the said real estate in fee simple absolute, and of all right, title, estate and interest therein or thereto as against the said defendants, and each of them; and that they may have all other and further relief as may be meet and agreeable to equity.

/s/ ARTHUR R. MEYER,
Attorney for Plaintiff.

/s/ HORACE S. DAVIS,
BROWN, DAVIS & SANDE,
BEN N. FORBES,
ROCKWOOD BROWN, JR.,

By /s/ HORACE S. DAVIS,
Attorneys for Plaintiffs.

[Endorsed]: Filed December 30, 1952.

[Title of District Court and Cause.]

ANSWER OF THE DEFENDANT
ROSEBUD COUNTY, MONTANA

I.

Defendant admits the allegations contained in paragraphs III and IV of the complaint; denies each and every allegation in paragraph VII of the complaint; admits that it claims some right, title, estate or interest in or to the real estate herein described, adverse to plaintiffs' claim as alleged in paragraph VIII of the complaint herein, but denies that its claim is wholly unfounded and without right

and that it has no right, title, estate or interest in or to the said real estate or in any part or parcel thereof; alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs I, II, V and VI of the complaint, and denies each and every other allegation contained in the complaint, not herein specifically admitted or denied;

II.

As a further and separate and affirmative defense, this answering defendant alleges:

1.

That the defendant did on January 15, 1943, duly and regularly and in full compliance with the laws of the State of Montana made and provided in such case, by and through its duly elected and qualified Clerk and Recorder, obtain from the duly elected and qualified Treasurer of Rosebud County, a tax deed to those certain lands described and set out in plaintiffs' complaint herein, more particularly described as follows, to wit:

All of Section Fifteen (15), in Township Eleven (11) North, of Range Thirty-two (32) East, M.P.M.

2.

That said tax deed was duly filed of record in the office of the County Clerk and Recorder on January 18, 1943, at 4:00 o'clock p.m., and duly recorded in Book 39 of Deeds, Page 334, Records of Rosebud County, Montana.

3.

Under and by virtue of said tax deed this defendant did, upon January 15, 1943, become the sole owner in fee simple absolute of the above-described premises, more particularly described as follows, to wit: All of Section 15, in Township 11 North, of Range 32 East, M.P.M., Rosebud County, Montana, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof;

4.

That thereafter and upon the 15th day of May, 1947, this defendant duly and regularly sold and conveyed by quit claim deed all of the above-described premises to Roy M. King and E. L. Grebe, some of the defendants herein named in plaintiffs' complaint, excepting and reserving unto Rosebud County, Montana, its successors and assigns, a royalty interest of $6\frac{1}{4}\%$ of all oil, gas and minerals recovered and saved from the lands above described; said deed was duly filed of record in the office of the County Clerk and Recorder on May 26, 1947, at 11:00 o'clock a.m., and duly recorded in Book 47 of Deeds, Page 155, Records of Rosebud County, Montana;

5.

That under and by virtue of the above-described tax deed and the reservations and exceptions contained in the herein-described quit claim deed, this answering defendant alleges that it is the sole owner

of a royalty interest of $6\frac{1}{4}\%$ of all oil, gas and minerals recovered and saved from the lands above described.

III.

As a further and separate and affirmative defense, this answering defendant alleges:

1.

That the cause of action stated in the complaint herein is barred by the provisions of Sections 2214, 2214.1 and 2214.2 of the Revised Codes of Montana of 1935, and Section 84-4160.1 of the Revised Codes of Montana of 1947.

IV.

As a further and separate and affirmative defense, this answering defendant alleges:

1.

That upon the 31st day of August, 1948, in the District Court of the Sixteenth Judicial District of the State of Montana, in and for the County of Rosebud, the same being a Court of general jurisdiction, a judgment was duly given and made in Civil cause No. 5475, wherein Roy M. King, one of the defendants named in plaintiffs' complaint herein, was plaintiff, and May W. Bentley, her heirs, successors and assigns, among others, and the unknown owners of the real property in the complaint herein described, and all other persons unknown, claiming or who might claim any right, title, estate or interest in, or lien or encumbrance upon the real property described in the complaint, or any thereof, adverse to

plaintiffs' ownership, or any cloud upon plaintiffs' title thereto, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate or accrued, were defendants, adjudging and decreeing the said Roy M. King to be the owner in fee simple of the lands and premises described as Section 15, in Township 11 North, of Range 32 East, M.P.M., said judgment being duly docketed August 31, 1948, at 2:00 o'clock p.m., and thereafter duly filed in the office of the County Clerk and Recorder on September 3, 1948, at 3:00 o'clock p.m., and duly recorded in Book 4 of Orders and Decrees, Page 487, Records of Rosebud County, Montana;

2.

That the plaintiffs contained in the plaintiffs' complaint in the above-entitled action, Raymond L. Rusnak and Joseph Homan, were unknown as claimants to any right, title, or interest in and to the above-described lands at the time of the above set out judgment and would, therefore, be included as defendants in the above-designated action and judgment as the unknown owners of the real property in the complaint herein described; that no appeal has been taken from said judgment and time for appeal or motion to set aside default judgment has long since passed.

3.

That by reason of said judgment, as aforesaid, these plaintiffs, and each of them, are estopped, barred and forever foreclosed from asserting any

claim, right, title or interest whatsoever in and to said premises.

V.

As a further and separate and affirmative defense, this answering defendant alleges:

1.

That at all times subsequent to the 18th day of July, 1939, the plaintiff May W. Bentley, knew, or in the exercise of reasonable care for the preservation of her property interests should have known, of the potential value of all of Section 15, in Township 11 North, of Range 32 East, M.P.M., for oil and gas; that her failure to pay taxes and assessments would subject said land to forfeiture to the County of Rosebud; that by reason of her failure to pay taxes from and after the year 1935, said land would be and has been forfeited to the County of Rosebud; that the plaintiff May W. Bentley knew, or in the exercise of reasonable care for the preservation of her own rights should have known, that because of her failure to pay taxes from and after the year 1935 the County of Rosebud would acquire tax deed to said lands; that in a consequence of such delinquency and neglect by the said plaintiff, the County of Rosebud did acquire a tax deed from the County Treasurer of Rosebud County on January 15, 1943; that thereafter the County of Rosebud did convey and quit claim said premises on May 15, 1947, to Roy M. King and E. L. Grebe; that the said Roy M.

King and E. L. Grebe have been in the exclusive, open, notorious, visible and continuous adverse possession of said property since that time and have paid all taxes and assessments legally levied and assessed upon said lands; that notwithstanding her knowledge of the potential value of said lands for oil and gas, and notwithstanding her known obligation for payment of taxes and her delinquency in payment and her knowledge that the lands would be and have been forfeited for such failure, plaintiff May W. Bentley abandoned said lands for upwards of 18 years and negligently slept on her rights, if any, and failed to assert any claim thereto until the present time when such lands have recently become valuable for oil and gas development; that in justice and equity plaintiff is barred by laches from now asserting any interest or rights in said property.

Wherefore, this answering defendant prays that plaintiffs take nothing by reason of their complaint, and this answering defendant be adjudged to be the sole owner of a royalty interest of $6\frac{1}{4}\%$ of all oil, gas and minerals recovered and saved from said lands above described, and for such other and further relief as may to this Court seem meet, just and equitable in the premises.

Dated this 22nd day of January, 1953.

RUSSELL K. FILLNER,
County Attorney, Forsyth,
Montana;

H. G. YOUNG,
Special Counsel,
Forsyth, Montana;

By /s/ RUSSELL K. FILLNER,
Attorneys for Defendant.

Service of Copy acknowledged.

[Endorsed]: Filed January 23, 1953.

[Title of District Court and Cause.]

AMENDED ANSWER OF THE DEFENDANTS,
ROY M. KING, SOMETIMES ROY KING,
AND CELIA I. KING, HIS WIFE, AND
EDWARD L. GREBE, SOMETIMES E. L.
GREBE, AND CAROLINE GREBE, HIS
WIFE

* * *

VI.

That in the month of October, 1947, the defendants, Roy M. King and his wife, Celia I. King, and E. L. Grebe and his wife, Caroline Grebe, made, executed and delivered to The Texas Company Oil and Gas Leases covering the hereinabove described property, granting to The Texas Company the exclusive right to develop and operate the said premises for oil and gas purposes, and warranting to the said The Texas Company that the Lessors, Roy M. King and his wife, Celia I. King, and E. L. Grebe and his wife, Caroline Grebe, were the owners

in fee simple of said premises and that they had good and marketable title to said premises; that under the said lease and pursuant to the terms thereof, The Texas Company entered upon the said premises and drilled three wells for oil to a depth of more than 4,800 feet, and at a reasonable cost for each of said wells of over \$65,000.00, in the year 1952, and obtained oil in each of said wells in commercial quantities in excess of 50 barrels of oil per day per well; that the first of said three wells reached oil on or about the 30th day of June, 1952, and became a regulated producer about the middle of July, 1952; that the second of said three wells developed oil on or about the 22nd day of August, 1952, and became a regulated producer on or about the 2nd day of September, 1952, and that the third of said three wells, hereinbefore referred to, developed oil on or about the 12th day of December, 1952, and became a regulated producer on or about the 16th day of December, 1952, and that the aggregate production from the said three wells so located, since their becoming regulated producers as hereinbefore set forth, up to the 30th day of December, 1952, being the date upon which this action was filed was on that date 51,232.53 barrels of oil, of an actual market value of \$105,686.34, all of which drilling and production occurred and accrued in the year 1952 and before the filing of this action by the plaintiffs.

VII.

That in the month of May, 1943, and at all times prior thereto, the reasonable market value of the

premises described in plaintiffs' Complaint herein did not exceed Three Thousand Dollars (\$3,000.00); but by reason of improvements placed upon said premises by the defendants, Roy M. King and E. L. Grebe, as hereinabove alleged, and the wells drilled upon said premises for oil under Oil and Gas Leases given by the defendants, Roy M. King and Celia I. King, his wife, and E. L. Grebe and Caroline Grebe, his wife, as lessors, to The Texas Company, as lessee, the said premises have greatly increased in value and are now of a reasonable market value in excess of One Hundred Ninety-five Thousand and No/100 Dollars (\$195,000.00) and these answering defendants allege that the said premises were of a reasonable value in excess of One Hundred Ninety-five Thousand and No/100 Dollars (\$195,000.00) before the plaintiffs commenced this action by filing their Complaint in this Court on the 30th day of December, 1952.

* * *

/s/ LOUIS P. DONOVAN,
Shelby, Montana;

/s/ F. F. HAYNES,
Forsyth, Montana; Attorneys for These Answering
Defendants.

[Endorsed]: Filed February 13, 1953.

[Title of District Court and Cause.]

DECISION

This is an action to quiet title to real property. Defendant Rosebud County, Montana, acquired fee simple title to the 640 acres of land involved herein, i.e., all of Section 15, Township 11 North, Range 32 East, M.P.M., the tax deed being issued by the County Treasurer of Rosebud County, Montana, to Rosebud County, Montana, under date of January 15, 1943, and showing a consideration of \$159.60, which represented the duly-assessed real property taxes on said land for the years 1935-36-37-38-39-40-41-42; unpaid and delinquent taxes over a period of eight years.

The abstract of title shows a quit claim deed dated May 21, 1927, from Frank R. Bentley to May W. Bentley, consideration of \$1.00, having been filed on August 24, 1939 (which filing was over 12 years after execution of said deed), conveying the land involved herein; and a quit claim deed, dated June 5, 1933, from Northern Pacific Railway Company, a corporation, to "Owner of the said land," consideration of \$1.00, conveyed "all mineral and rights of mining heretofore reserved by first party, to wit: * * *.", describing the land involved herein.

Counsel filed stipulation of facts at the time of the trial and the following certified photostatic exhibits were offered and received in evidence:

Exhibit "A," County Treasurer's Certificate of Tax Sale, numbered B No. 3031, dated July 15, 1936;

Exhibit "B," Tax Deed, dated January 15, 1943,

from the County Treasurer of Rosebud County to Rosebud County, Montana, certified by the County Clerk and Recorder, which contains pertinent facts set forth in Exhibit "A";

Exhibit "C," Contract for Deed, dated May 20, 1943, between Roy M. King and E. L. Grebe, and the Board of County Commissioners of Rosebud County, Montana, for purchase of said land, certified by County Clerk and Recorder.

Exhibit "D," consists of the following instruments certified by the County Clerk and Recorder:

Affidavit and Proof of Service, dated January 4, 1943;

Notice of Application for Tax Deed, dated October 13, 1942, To: May W. Bentley;

Affidavit of Publication, dated December 8, 1942, re: Notice of Application for Tax Deed, publication having been made on November 12th and 19th, 1942;

Envelope with return address "Guy W. Gray, Clerk and Recorder, Rosebud County, Forsyth, Montana," addressed to "May W. Bentley, Madison, Wisconsin," with postmark and stamps thereon;

Receipt for Registered Article No. 558, from County Clerk addressed to May W. Bentley, Madison, Wis.

Entry of filing of above instruments on January 15, 1943, by County Clerk and Recorder, Rosebud County, Montana.

Exhibit "E," consists of the following instruments certified by the County Treasurer:

Request for tax deed, dated January 15, 1943, by Clerk and Recorder to County Treasurer, Rosebud County, Montana;

Affidavit and Proof of Service, dated January 4, 1943, by County Clerk;

Notice of Application for Tax Deed, To: May W. Bentley, dated October 13, 1942, Rosebud County, Montana, by Guy W. Gray, Clerk and Recorder;

Entry of filing of above instruments on January 15, 1943, by Deputy County Treasurer, Rosebud County, Montana.

Exhibit "F," Quit Claim Deed, dated May 15, 1947, from Rosebud County, Montana, to Roy M. King and E. L. Grebe, of Sumatra, Montana, certified by County Clerk and Recorder.

On October 16, 1947, an action was instituted in State Court in the Sixteenth Judicial District in and for Rosebud County, Montana, by Roy M. King, Plaintiff, vs. William LaFurge, et al., (and May W. Bentley included), for the purpose of quieting title in and to "All of Section 15, Township 11 North, Range 32 East, M.P.M.," and judgment and decree signed and filed on August 31, 1948, to which further reference is hereinafter made.

Thereafter this action in federal court was commenced on January 6, 1953, by May W. Bentley, the former owner of record, and Raymond L. Rusnak and Joseph Homan, who by a Quit Claim Deed & Assignment, dated April 5, 1952, and filed Janu-

ary 14, 1953, for a consideration of \$100.00, acquired a one-half interest in and to the title or claim for title of May W. Bentley in the land involved herein, and was designated as an action to quiet title in fee simple absolute against any claims of the said defendants named herein to the said land.

It appears that in the County Treasurer's Certificate of Tax Sale, dated July 15, 1936, that the said real property was described as follows: "All Sec. 15-11-32."

Plaintiffs contend that such a designation of description is insufficient, and, therefore, the tax deed is invalid, and cite various authorities to the effect that where there is ambiguity and uncertainty such defects cannot be cured by evidence aliunde; citing *Miller vs. Murphy*, 119 Mont. 393, 175 Pac. 2d, 182; and reference is made to decisions in other States than Montana under statutes considered comparable to the Montana statute.

Defendant Rosebud County distinguishes from the *Miller* case, *supra*, and other cases cited by plaintiff, stating that in the *Miller* case the defective description was in the notice of application for tax deed, while in this case the abbreviated description was in the certificate of sale from the County Treasurer of Rosebud County to Rosebud County, Montana, and that the land as described in the assessment, notice of application for tax deed and the tax deed itself all contained the full description, i.e., "All of Section 15, Township 11 North, Range 32 East,

M.P.M.; that the certificate of sale is not notice to the owner that his property is for sale, nor to bidders that the land is to be sold but is given after the land is sold, and that the notice of sale was properly given as provided by Section 2182, R.C.M. 1935. Section 84-4124, R.C.M. 1947, as amended and reenacted by Section 1, Chapter 170, Laws of 1947, provides for validation with respect to certificates of sale as therein set forth. It further appears from the testimony of an expert witness in the field of civil engineering that the description in the certificate of tax sale is certain, and could not refer to any land other than the land described in the tax deed. In view of the foregoing it would seem to the court that the description used in this instance in the said certificate is not such an insufficient or ambiguous description as would invalidate the tax deed herein, and such is the finding of the court.

In respect to the tax title proceedings and the matter of compliance with Sections 2209 and 2212 of the Revised Codes of Montana, 1935, it appears that the affidavit herein provides such showing as the law requires and is therefore sufficient until any such alleged fact is proven otherwise by competent evidence.

The affidavit filed in the office of the County Treasurer states that the County Clerk and Recorder served a copy of the attached notice upon the owner of the property, namely, May W. Bentley, by depositing in the Postoffice at Forsyth, Montana, an envelope containing a copy of said Notice, securely

sealed, with postage both regular and for registration thereon, and marked "Return Receipt Requested"; said envelope being addressed as follows: "May W. Bentley, Madison, Wis."

The registered letter was addressed to the post office address of said owner as disclosed by the records in the office of the County Clerk and Recorder, as required by Section 2209. However, said Section 2209 further provides for publication, "* * * provided, that in all cases where the post office address of the owner, mortgagee, or assignee is unknown, the applicant shall publish once a week for two (2) successive weeks * * *."

The affidavit then states that the said letter was returned and is on file in the office of the County Clerk of Rosebud County, Montana; that he caused to have a notice of application for tax deed published in the Forsyth Independent for two consecutive weeks as is further shown by affidavit of publication which is on file in the office of the County Clerk of Rosebud County, Montana. In this case the records show, whether it was necessary or not, valid service was also effected by publication.

Plaintiff's counsel concedes that the Notice of Application for Tax Deed to May W. Bentley was attached to the Affidavit and Proof of Service and made a part thereof so that it could be considered by the County Treasurer with respect to service of notice by said registered letter and also service of notice by said publication; in said notice, dated

October 13, 1942, it is stated: "That the period within which the said above-described lands and premises may be redeemed from the sale to pay the taxes for the year 1935 has long since expired, and that the undersigned will, on the 15th day of January, 1943, which will be at least sixty (60) days after the service of this notice upon you, make application to the Treasurer of Rosebud County for tax deed to be issued to it as provided by law. * * *."

Counsel for defendant relies upon the case of *Milne vs. Leiphart*, 119 Mont. 263, 174 Pac. 2d 805, at pages 808, 809, wherein it is stated:

"An affidavit was filed by the county clerk in the county treasurer's office showing that he deposited in the United States post office at Conrad an envelope containing a copy of the notice, by registered mail, postage prepaid, addressed to Harvey Leiphart, E. 724 Walton, Spokane, Washington. That was sufficient proof to justify the county treasurer in issuing the tax deed. * * *."

It does not appear in the record there is any proof made that the notice required by Section 2209, *supra*, was not given, and with respect to proof this said Section also provides, in part, as follows: "* * * In all cases due proof of service of notice in whatever manner given, supported by the affidavit required by law, must be filed immediately with the clerk and recorder of the county in which the property is situated, and be kept as a permanent file in his office,

and such proof of notice when so filed shall be prima facie evidence of the sufficiency of the notice.”

It is evident from the tax deed that in the procedure of the issuance and execution of said tax deed the County Treasurer, Bert Shotwell, personally appeared before the County Clerk and Recorder, Guy W. Gray, for the acknowledgement of the signature of the County Treasurer in his execution of said tax deed on January 15, 1943, which reads, in part: “* * * the said grantee has given the necessary notice of application for tax deed as required by law. * * *.” The instruments in Exhibit “D” herein at that time were on file in the office of the County Clerk and Recorder and available for inspection, as public records, by the County Treasurer, when he personally appeared in that office, for inquiry or question with respect to authority or jurisdiction or any other purpose, so that it would seem, in addition to the proof made herein, the maxim is applicable that means of knowledge and knowledge itself are, in effect, the same thing.

The above-quoted portion of the said notice, which was attached to and made a part of the required affidavit, and so conceded, as mentioned hereinbefore, to have been properly considered by the County Treasurer sets forth the requirements of Section 2209, *supra*, and the affidavit recited the registered letter containing said notice was actually mailed, and also he caused said notice to be published, as shown by the affidavit of publication filed in the office of the County Clerk and Recorder, which said

affidavit, when read in conjunction with the notice, makes the showing required by Section 2212, Revised Codes of Montana, 1935.

There is a question raised by the plaintiffs herein as to whether or not such time element of notice as shown by the affidavit and notice, when read in conjunction with each other, was actually given to meet the requirements of the statute in the determination of the County Treasurer. In this respect it would also seem proper to state that, of course, if the affidavit or instruments filed in the County Treasurer's office were false, anyone adversely affected thereby would have grounds for redress, and this is also true with regard to the affidavit and instruments filed in the County Clerk's office showing the proof of service of notice.

It is to be noted that Section 2209, *supra*, requires that due proof of service of notice be filed with the County Clerk, whereas, Section 2212, *supra*, does not require due proof of service to be filed in the office of the County Treasurer; all that is required is the filing of "an affidavit showing that the notice hereinbefore required to be given has been given as herein required."

In the case of *Cavitt vs. Seirson, et al.*, (1946), 119 Mont. 437, 175 P. 2d 767, it is stated the statutory presumptions "subsections 15 and 33 of section 10606, R.C.M. 1935, providing: 15. That official duty has been regularly performed. 33. That the law has been obeyed.", were applicable, when grounded upon an established fact, with respect to the record

failing to show whether or not the county clerk made and filed with the county treasurer the affidavit required by section 2212, and that such proof not appearing in the record the county treasurer was without authority to issue the tax deed. But in this instance, while there are established facts, i.e., all the necessary instruments of proof on file as public records, it does not seem that there was any presumption on the part of the County Treasurer.

The request for tax deed, dated January 15, 1943, which is the same date on which the said tax deed was executed, is a part of Exhibit "E" herein, and was filed with the County Treasurer by the County Clerk and Recorder, under his official seal, and sets forth a resume of all of the proceedings had pertaining to said land, including the official statement " * * * and the time of redemption having elapsed, being five years from date of sale, and sixty days having elapsed since the giving of Notice of Application for Tax Deed, * * *."

In view of the foregoing it does not appear necessary to give consideration to the contentions of the plaintiffs with respect to the quiet title action instituted in State Court on October 16, 1947, in Roy M. King, Plaintiff, vs. William LaFurge, et al., because it pertains to the title to the same land as was involved in the prior tax title action, and it also included May W. Bentley and Rosebud County, Montana, et al., as parties defendant; it was apparently an additional safeguard after pur-

chase of the tax title from Rosebud County, Montana, hence, any contentions of defects of any kind in that quiet title action could not be intermingled to defeat or affect the validity of the title acquired by Rosebud County, Montana, by the tax deed; it should be noted with respect to the status or relationship of the defendant Rosebud County herein that this action involves only one cause of action on the issue of title, that there is but one title to the said land and the reservation of 61¼% royalty to said county is a reservation out of the title transferred by quit claim deed from Rosebud County, Montana, to Roy M. King and E. L. Grebe; said deed being Exhibit "F" herein.

The case was tried May 26, 1954, and counsel were given 40 and 20 days for briefs after receipt of transcript. When plaintiffs filed their reply brief on October 6, 1954, they also filed a stipulation for voluntary dismissal with prejudice between the plaintiffs and the defendants, Roy M. King, Celia I. King, Edward L. Grebe and Caroline Grebe, and also on October 6, 1954, the order submitted was signed by the court, with each party to bear his own costs, providing: "* * * the said-named defendants stipulate that they have compromised and settled all claims to the real property described in the plaintiffs' complaint, and that there are no issues remaining between the said plaintiffs and the said-named defendants, and that the said-named defendants have no interest in the claim between the plaintiffs and the defendant, Rosebud County, Montana, a body corporate, to a 61¼% royalty of

all oil, gas and minerals recovered and saved and to be recovered and saved from the lands described in the plaintiffs' complaint." "It is hereby ordered that the plaintiffs' complaint so far as it pertains to the defendants named in the said stipulation is dismissed with prejudice, and the Answer and Amended Answer of the said-named defendants, and the affirmative defenses therein, are likewise dismissed with prejudice, and each party is to bear his own costs. * * *"

In view of the consideration of the evidence herein and the findings of the court it becomes evident that the court is of the opinion the proceedings conducted by the officers of Rosebud County to obtain a tax deed to the tract of land in question, to said county, disclose a sufficient compliance with the requirements of the laws applicable thereto and are therefore valid and thereby render the tax deed issued by the County Treasurer to Rosebud County a valid instrument; that the stipulation of dismissal with prejudice between plaintiffs and certain of the defendants, and the order entered thereon, do not affect the issue of title to be determined by the court, and such is the decision of the court herein. Exceptions allowed counsel. Findings of fact and conclusions of law and form of judgment may be submitted by counsel.

/s/ CHARLES N. PRAY,
Judge.

[Endorsed]: Filed January 14, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause, an action to quiet title to real property, came on regularly for trial before the Court, sitting without a jury, on May 26, 1954. When plaintiffs filed their reply brief on October 6, 1954, they also filed a stipulation for voluntary dismissal with prejudice between the plaintiffs and the defendants, Roy M. King, Celia I. King, Edward L. Grebe and Caroline Grebe, and, also, on October 6, 1954, the order submitted was signed by the Court with each party to bear his own costs, providing: “* * * the said-named defendants stipulated that they have compromised and settled all claims to the real property described in the plaintiffs’ complaint, and that there are no issues remaining between the said plaintiffs and the said-named defendants, and that the said-named defendants have no interest in the claim between the plaintiffs and the defendant, Rosebud County, Montana, a body corporate, to a 6¼% royalty of all oil, gas and minerals recovered and saved and to be recovered and saved from the lands described in plaintiffs’ complaint,” and accordingly it was ordered that the plaintiffs’ complaint, so far as it pertains to the defendants named in said stipulation, was dismissed with prejudice and the answer and amended answer of the said-named defendants and the affirmative defenses therein, were likewise dismissed with prejudice, each party to bear his

own costs, and the Court having duly considered the evidence, both oral and documentary, and the stipulation of the parties, and being fully advised in the premises, now finds as follows:

Findings of Fact

I.

That the plaintiffs herein, May W. Bentley, Raymond L. Rusnak and Joseph Homan, are all non-residents of the State of Montana, being residents of the State of Illinois, and that all of the defendants are residents of the State of Montana, and that the amount in controversy exceeds \$3,000.00.

II.

That this defendant, Rosebud County, Montana, acquired title to the 640 acres of land involved herein, i.e., all of Section 15, Township 11 North, Range 32 East, M.P.M., by tax deed being issued by the County Treasurer of Rosebud County, Montana, to Rosebud County, Montana, under date of January 15, 1943, and showing a consideration of \$159.60, which represented the duly assessed real property taxes on said land for the years, 1935-36-37-38-39-40-41-42; unpaid and delinquent taxes over a period of eight years.

III.

That thereafter the county entered into a contract for deed, dated May 20, 1943, between Roy M. King and E. L. Grebe, and the Board of County Commissioners of Rosebud County, Montana, for

the purchase of said land, certified by the County Clerk and Recorder.

IV.

That a quit claim deed was executed, dated May 15, 1947, from Rosebud County, Montana, to Roy M. King and E. L. Grebe, of Sumatra, Montana, certified by the County Clerk and Recorder, excepting and reserving unto Rosebud County, Montana, its successors and assigns, a royalty interest of 6¼% of all oil, gas and minerals recovered and saved from said lands therein described, and duly recorded in the office of the County Clerk and Recorder of Rosebud County, Montana, on the 26th day of May, 1947, in Book 47 of Deeds, page 155, records of Rosebud County, Montana.

V.

That the proceedings conducted by the officers of Rosebud County to obtain said tax deed to the tract of land in question, to said county, disclosed the sufficient compliance with the requirements of the laws applicable thereto and are, therefore, valid and thereby render the tax deed issued by the County Treasurer to Rosebud County a valid instrument.

VI.

That the stipulation of dismissal with prejudice between plaintiffs and certain of the defendants and the order entered thereon does not affect the issue of title to be determined by the Court.

Conclusions of Law

I.

That the defendant, Rosebud County, Montana, acquired fee simple title to the 640 acres of land involved; that is, all of Section 15, Township 11 North, Range 32 East, by tax deed issued by the County Treasurer of Rosebud County, Montana, under date of January 15, 1943, and that by reason thereof the subsequent conveyance by the county reserving a 6¼% royalty of all oil, gas and minerals produced and saved from said premises is a valid and subsisting reservation, and that Rosebud County is now the sole owner and entitled to receive said 6¼% royalty of all oil and gas produced and saved from said premises.

II.

That the plaintiffs take nothing by their said complaint and that defendant have judgment for its costs and disbursements herein expended.

It Is So Ordered and counsel for defendant, Rosebud County, Montana, will submit appropriate judgment in accordance herewith.

Dated this 26th day of January, 1955.

/s/ CHARLES N. PRAY,
United States District Judge.

[Endorsed]: Filed January 26, 1955.

The description of the real property contained in the County Treasurer's Certificate of Tax Sale, dated July 15, 1936, was not ambiguous to the extent that would invalidate the tax deed, dated January 15, 1943.

2. The District Court erred in admitting the testimony of H. D. Young to the effect that the description of the real property in the said Certificate of Tax Sale is certain and could not refer to any land other than the land described in the tax deed.

3. The District Court erred in concluding as a matter of law that the proceedings that were conducted by the officers of Rosebud County complied with the requirements of the laws of Montana applicable thereto, and that the said tax deed was a valid instrument.

4. The District Court erred in entering judgment for the appellee, Rosebud County, Montana, declaring that Rosebud County is the sole owner and entitled to receive $6\frac{1}{4}\%$ royalty of all oil and gas produced and saved from the premises involved herein, and for costs.

BROWN, SANDE & FORBES,

ROCKWOOD BROWN, JR.,

By /s/ BEN N. FORBES,

Attorneys for Appellants, May W. Bentley, Raymond L. Rusnak and Joseph Homan.

[Endorsed]: Filed March 3, 1955.

In the District Court of the United States, in and
for the District of Montana, Billings Division

Civil Cause No. 1460

MAY W. BENTLEY, et al.,

Plaintiffs,

vs.

ROSEBUD COUNTY, et al.,

Defendants.

Before: Honorable Charles N. Pray.

Billings, Montana, May 26, 1954

PROCEEDINGS

Appearances:

MR. ARTHUR R. MEYER,

Attorney at Law,

Billings, Montana;

MR. CHARLES B. SANDE,

MR. BEN N. FORBES, of

MESSRS. BROWN, DAVIS & SANDE,

Attorneys at Law,

Billings, Montana,

For Plaintiffs.

MR. RUSSELL K. FILLNER,

MR. H. G. YOUNG,

Attorneys at Law,

Forsyth, Montana,

For Rosebud County.

MR. F. F. HAYNES,

Attorney at Law,

Forsyth, Montana;

MR. LOUIS P. DONOVAN,

Attorney at Law,

Shelby, Montana,

For Roy M. King, et al.

* * *

Court resumed, pursuant to recess, at 2:00 o'clock p.m. on May 26, 1954, at which time all counsel were present as at the morning session.

The Court: Well, gentlemen, are you ready to proceed?

Mr. Sande: We are, your honor.

The Court: Very well.

Mr. Sande: May it please the court and counsel for defendants—first of all I would like to apologize to the court for the delay this morning, but I think that was well spent.

The Court: I have no doubt it was.

Mr. Sande: Your honor, so far as the opening statement in the case I realize the case has been up upon several different motions, and I am quite sure the court has an understanding of the issues involved in the case and we do not think it necessary to go into any opening statement.

The Court: I do not think it is necessary, and we can take whatever proof you have to take and any stipulation you may have.

Mr. Sande: In order to simplify the issues in the case I would like the record to show that the parties,

and all of the parties, have entered into a stipulation, stipulating as to certain facts and at this time the plaintiffs would like to offer in evidence Plaintiffs' [5*] Exhibit No. 1.

Mr. Haynes: No objection.

Mr. Sande: Now, your honor, I would like the record to show this, there is a complete understanding I believe between counsel for both plaintiffs and defendants as to the effect of this stipulation. However, as an example, there are certain exhibits attached to this Exhibit No. 1, and what they are, they are copies.

The Court: Is that a stipulation with exhibits attached?

Mr. Sande: Yes, your Honor. Now in regard to the exhibits they actually are copies of the tax title proceedings, and it is our position that we are not stipulating that these are as to the legal effect or to the validity of the instruments but merely stipulating to the authenticity of the documents; is that correct?

Mr. Haynes: That is right.

The Court: Yes. [6]

* * *

Mr. Sande: At this time the plaintiffs offer into evidence Plaintiff's proposed Exhibit No. 2, which purports to be a deed from Frank R. Bentley to May W. Bentley, the instrument being certified by the County Clerk and Recorder of Rosebud County, Montana.

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

Mr. Haynes: No objection.

Mr. Sande: There is no objection, your honor.

Mr. Fillner: No objection.

The Court: No objection, it may be received in evidence.

Mr. Sande: Does the record show I offered in [8] evidence Plaintiffs' proposed Exhibit No. 3? We at this time offer in evidence Plaintiffs' proposed Exhibit No. 3.

Mr. Haynes: No objection.

Mr. Fillner: No objection.

The Court: No objection, it may be received in evidence.

Mr. Sande: Your honor, that includes our proof except for the fact I would like to have the record state that the Plaintiffs stand ready and are ready and willing to pay any sums that might be found due in the event that judgment is in favor of the plaintiff for the payment of any taxes, penalty or interest and the reasonable value of any improvements placed upon the premises involved if demand is made—strike that if demand is made—if upon proof by the defendants of the amount. I would like to also at this time call attention to the court that it is provided in the stipulation that the Plaintiffs are all residents of States other than Montana and that the Defendants are residents of Montana. Further, that in the stipulation it has been agreed that the May W. Bentley is one and the same May W. Bentley in Plaintiff's Exhibit No. 2; and that Raymond L. Rusnak and Joseph Homan, Plaintiffs, are one and the same

persons as the grantees appearing in Plaintiff's Exhibit No. 3.

Mr. Sande: At this time, your Honor, the plaintiffs [9] rest.

The Court: Very well.

Mr. Haynes: Will you please mark these as Defendants' Grebe and King exhibits?

Mr. Haynes: Comes now the defendants and offer in evidence Defendants' Exhibit No. 4, which is a certified and authenticated copy of the judgment roll in civil case No. 5475, Roy M. King, Plaintiff, vs. William La Furge, et al., and becomes relevant in the case, sir, because of one of the affirmative defenses.

The Court: Any objection?

Mr. Sande: To which we object at this time upon the grounds that the said purported exhibit is incompetent and for the reasons that the judgment roll and particularly the affidavit of publication therein contained and the order for publication of summons affirmatively shows want of service upon the defendant therein, May W. Bentley; for the reasons that the said affidavit of publication of summons does not in any particular comply in its recitals with the controlling sections of our code in effect at that time, that is, Section 9482, R.C.M. 1935. (b) That no fair reading of the recitals of the affidavit for publication of summons justifies the conclusion that in substance if not in words there has been a compliance with Section 9482, [10] Revised Codes of Montana, 1935. (c) The evidentiary facts set out in the affidavit for publication of summons do not show diligence within the meaning and requirements of the Montana statutes in force and effect at the time

the said affidavit was made; that for the reasons and the grounds heretofore mentioned the recitals contained in the judgment to the effect "all of said defendants have been duly and regularly served with process in this action" should yield to what the judgment roll actually and affirmatively shows on its face and that therefore said judgment is not binding upon the plaintiff May W. Bentley or her transferees or assigns.

Mr. Forbes: On the further ground that the judgment roll affirmatively shows that the court named as the District Court of the Sixteenth Judicial District of the State of Montana in and for the County of Rosebud, did not have jurisdiction of the cause set forth in said judgment roll.

The Court: That is Exhibit 4, is it?

Mr. Sande: Yes.

The Court: It may be received subject to the objection presented.

Mr. Sande: Your honor, did you rule on Exhibit 4? I didn't hear what it was.

The Court: It will be received subject to the objections. [11]

Mr. Haynes: Comes now the defendants and offer in evidence their Exhibit No. 5 which constitutes an abstract showing the train of title through to the certificate of the particular land involved in this case.

The Court: Any objection?

Mr. Sande: At this time the plaintiffs object to defendants' proposed Exhibit No. 5, on the grounds that it is incompetent, irrelevant and immaterial;

that there is no proper foundation laid; also we object to the introduction of said exhibit for the reason that it is incompetent, irrelevant and immaterial in that a certain tax deed appearing at page 34 appears and there is no proper foundation laid for the introduction of the same in that there is no showing by the affidavit of proof of service by the County Clerk and Recorder filed in the County Treasurer's office showing the giving of proper notice for the application of said tax deed.

The Court: The same ruling as before; it will be received subject to the objections offered.

Mr. Haynes: Call H. D. Young. [12]

H. D. YOUNG

was called as a witness for defendants, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Haynes:

Q. You may state your name, sir.

A. H. D. Young.

Q. You are engaged in what profession?

A. As Civil Engineer.

Q. You are also a member of the Bar of this State?

A. Yes.

Q. Where have you practiced your profession of engineering in the last two years?

A. Headquarters in Forsyth, Montana.

Q. In your capacity as engineer have you had occasion to familiarize yourself and are you familiar with the meridians and townships and ranges of the

Montana, and Roy M. King and E. L. Grebe, defendants. [15]

Mr. Sande: To which we object; the instrument is incompetent, irrelevant and immaterial and no proper foundation laid.

The Court: Same ruling.

Mr. Haynes: And we make the same offer to the affidavit of publication and proof of service in connection with the tax deed, and the same offer with relation to the notice of application for tax deed, which is also attached to the tax deed.

The Court: Your objections are continuing?

Mr. Sande: Yes, sir.

The Court: Same ruling.

Mr. Sande: We make the same objections.

Mr. Haynes: We make the same offer to the affidavit for publication attached to the stipulation.

The Court: Same objection and same ruling.

Mr. Haynes: We make the same offer with relation to the sheet showing receipt for registered article addressed to May W. Bentley of Madison, Wisconsin.

The Court: Same objection and same ruling.

Mr. Haynes: And the same offer with relation to the filing of the County Clerk and Recorder.

The Court: Same objection and same ruling.

Mr. Haynes: Same offer with relation to request to Bert Shotwell, County Treasurer, Rosebud County, Montana; [16] photostats being attached to the exhibit and the request being for the issuance of the tax deed.

Mr. Sande: Same objection.

The Court: Same objection and same ruling.

Mr. Haynes: And on the reverse side of the same photostat we offer the affidavit and proof of service of Guy W. Gray, Clerk and Recorder, Rosebud County, with relation to the application.

Mr. Sande: Same objection.

The Court: Same ruling.

Mr. Haynes: And we make the same offer with relation to the photostat attached to the stipulation, being the notice of application for tax deed addressed to May W. Bentley.

Mr. Sande: Same objection.

The Court: Same ruling.

Mr. Haynes: And we now make the same offer with relation to the quit claim deed, being the last photostat of the exhibit, passing from Rosebud County, Montana, to the defendants Roy M. King and E. L. Grebe.

Mr. Sande: Same objection.

The Court: Same ruling.

Mr. Haynes: Do you have, Mr. Clerk, the original deposition of Grebe in this case?

The Clerk: It hasn't been opened. [17]

Mr. Haynes: No. Well, we can open it.

Mr. Haynes: Comes now the defendants and all of them and offers in evidence the stipulation in this case of Edward L. Grebe taken at Helena, Montana, upon the application of the plaintiffs.

Mr. Sande: Deposition.

Mr. Haynes: Deposition. Pardon me. And the accompanying stipulation, if you will show it that way, Mr. Reporter.

Mr. Haynes: Now, would you give me a filing on this and then I will ask to have the filing made before the offer with your permission.

Mr. Haynes: Now, in offering the deposition and its accompanying stipulation may I request the court that the offer may be considered as having been made subsequent to the filing rather than before?

The Court: Very well, it may be considered.

Mr. Haynes: I assume it may be understood that the deposition may be considered as read to you?

The Court: Oh, yes, there is no need of my taking the time to read it now.

The Court: Is there anything to be said about the deposition?—I didn't read it. There is no objection?

Mr. Forbes: Your Honor, we have stipulated the deposition may be read and it is contained in our Exhibit 1. [18]

Mr. Haynes: We think that in our stipulation that we have so stated the case from its inception down and refer to the exhibits and everything of that kind so that the court will have upon the conclusion of the reading of that exhibit the complete case without exception. That is all.

Mr. Haynes: Now the record may show that the defendants Grebe and King rest.

Mr. Fillner: If it please the Court, the defendant Rosebud County, the offer made by counsel for the defendants Grebe and King, the same offer I presume will apply to the defendant Rosebud County?

The Court: Yes.

Mr. Fillner: In that case defendant Rosebud County rests.

The Court: Very well.

Mr. Sande: In regard to the rebuttal of the plaintiffs I wish to refer to Plaintiffs' Exhibit No. 1 and specifically to the exhibit attached and which is entitled County Treasurer certificate of tax sale which has formerly been offered in evidence by the defendants and we wish to withdraw any objection as to the offer in evidence of the specific item entitled County Treasurer Certificate of Tax Sale and offer the same in evidence ourselves. [19]

The Court: Very well, it may be received in evidence upon your offer. It has already been received subject to your objection before.

Mr. Sande: That is right, your Honor.

Mr. Sande: Also referring to Plaintiffs' Exhibit No. 1 and in particular to the attached exhibit and which is entitled affidavit and proof of service and which is filed in the County Treasurer's office and not in the County Clerk and Recorder's office, in regard to that particular exhibit we wish to withdraw any objections that we formerly had and at this time offer that particular exhibit specifically.

The Court: Very well, it may be received.

Mr. Sande: Your Honor, the plaintiffs rest.

The Court: That is your rebuttal. Very well, that terminates the case. Now you will want the record written up and upon the receipt of a copy of the transcript such as has been taken here this afternoon. How long a time do you need for briefs on the plaintiffs' side?

Mr. Sande: 40 and 20 days, respectively.

The Court: 40 days and 20 for reply?

Mr. Sande: 40 for plaintiffs, 40 for answer and 20 for reply to the defendants.

The Court: 40 days on a side?

Mr. Sande: Yes. [20]

The Court: And 20 for reply, plaintiffs' reply?

Mr. Sande: That is correct, your Honor.

The Court: Very well, we will so understand and it will be so noted in the record. That seems to be all for this afternoon. The court will stand in adjournment until nine-thirty tomorrow morning. (5/27/54—3:00 P.M.) [21]

Reporter's Certificate

United States of America,
State of Montana—ss.

I, Sidney O. Smith, do hereby certify that I am the official court reporter in the above-entitled court; that the foregoing and annexed transcription is a full, true and correct transcript of the proceedings had and testimony taken, Civil Cause No. 1460, May W. Bentley, et al., Plaintiffs, vs. Rosebud County, et al., Defendants, at Billings, Montana, on May 26, 1954.

Dated at Great Falls, Montana, this 10th day of June, 1954.

/s/ SIDNEY O. SMITH,
Official Court Reporter.

[Endorsed]: Filed June 10, 1954. [22]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby certify that the annexed papers are the originals filed in Case No. 1460, May W. Bentley, Raymond L. Rusnak, and Joseph Homan, Plaintiffs, v. Rosebud County, Montana, a body corporate; Roy M. King, sometimes Roy King, and Celia I. King, his wife, and Edward L. Grebe, sometimes E. L. Grebe, and Caroline Grebe, his wife, Defendants, and designated by the parties as the record on appeal in said cause; and I further certify that I transmit herewith, as a part of the record on appeal, the Reporter's Transcript of Record filed on June 10th, 1954, and the exhibits called for in the designations, to wit: Plaintiffs' Exhibit 1 (including Stipulation) and Plaintiffs' Exhibits 2 and 3, and Defendants' Exhibit No. 4.

Witness my hand and the seal of said Court at Great Falls, Montana, this 18th day of March, 1955.

[Seal]

H. H. WALKER,
Clerk;

By /s/ C. G. KEGEL,
Deputy Clerk.

